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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/844,822	04/26/2001	William P. Apps	RPC 0572 PUS	4123
33171	7590	02/25/2004	EXAMINER	
KONSTANTINE J. DIAMOND 4010 E. 26TH STREET LOS ANGELES, CA 90023			CASTELLANO, STEPHEN J	
			ART UNIT	PAPER NUMBER
			3727	

DATE MAILED: 02/25/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/844,822	APPS ET AL. <i>[Signature]</i>
	<b>Examiner</b>	<b>Art Unit</b>
	Stephen J. Castellano	3727

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 22 December 2003.

2a) This action is FINAL.                    2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1-3,12-16 and 18-64 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-3,12-16 and 18-64 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_\_

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-3, 55 and 56 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites the limitation " the lower wall portion" in line 7. There is insufficient antecedent basis for this limitation because it can't be determined which of the lower wall portions is being referred to since there are at least two opposing side walls and each side wall has a lower wall portion.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 29-31, 33-44, 58, 59 and 64 are rejected under 35 U.S.C. 102(b) as being anticipated by Apps et al. ('874) (Apps).

Apps discloses a stackable low depth bottle crate comprising a floor, a pair of side structural members and a pair of end walls, pylons and columns, the side structural members having a lower edge and an upper edge, wherein each of a pair of columns extends to an uppermost surface that is a first height above a first location and wherein another one of the columns has an uppermost surface that is a second height above a second location, the second height is different than the first height, the uppermost surface of the another one of the columns is substantially coplanar with an uppermost surface of one of the pylons.

Re claim 33, see Fig. 4, 5, 15 and 16 for ribs on the case bottom which define retaining tabs which attach the side members to the floor structure and which define an interior surface of the inner compartment between adjacent pylons.

Re claim 39, see Fig. 9a and 9b for bottle closure acceptance areas.

Re claims 40 and 41, see Fig. 2 and vertical wall 29 which is a portion of the column, which extends below the lower edge of the side structural member and which is substantially coplanar with the lower surface of the floor structure.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Note that: a wave may have many shapes, sinusoidal, square, saw tooth, etc.

Claims 1-3, 12-16, 18-40 and 42-64 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps ('874) in view of Kelly, Kappel et al. (Kappel) and Exhibit 2 from D.W. Plastics.

Even though rejected above, claims 29-31, 33-40, 42-44, 58, 59 and 64 have been repeated in this rejection to show that these claim's limitations are still met after modifying the lower wall portion to have differently contoured upper and lower edges.

For claims 1, 60 and 64, Apps discloses a stackable low depth case for retaining and transporting bottles, the case comprising opposing side walls, opposing end walls, a bottom, the side walls including a lower wall portion having an upper edge and a lower edge, spaced pylons,

four corner pylons and columns. Apps discloses the invention except for the upper edge and lower edge having a curved shape as stated in claims 1 and 60.

For claims 12, 29, 45, 50, 58 and 59, Apps discloses a stackable low depth bottle case comprising a floor structure, a pair of side structural members including a lower edge and an upper edge, pylons, corner pylons, columns, one of the columns extending a first height above a first location, another of the columns extending a second height above a second location, a column is located at the intersection of the longitudinal axis and the transverse axis, the columns have upper surfaces which are coplanar.

For claims 12 and 50, Apps discloses the invention except for second height being greater than the first height.

For claim 45, Apps discloses the invention except for the height of the first location being vertically offset from the height of the second location.

Kelly teaches a beverage container case having opposing side walls, the side walls including a lower wall portion (the wave-shaped logo portion), the upper and lower edges of the lower wall portion are curved. Kappel teaches a bottle case having opposing side walls (the walls at the ends, one is shown with the word "SLOGAN"), the side walls including a lower wall portion (the wave-shaped portion 31), the upper and lower edges of the lower wall portion are curved. It would have been obvious to one having ordinary skill in the art to have employed the integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics in modifying the shape of the lower wall portions to provide a contoured wave-shaped upper and lower edge as motivated by the consumer exposure to an advertisement logo and the durability of an integrally molded design which can't be peeled or easily broken off. This modification also provides the

vertical offset configuration mentioned in claim 45 and the second height being greater than the first height relationship claimed in claims 12 and 50.

Claims 12-16 and 18-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps ('874) (Apps) in view of Wallace, Kelley, Kappel and D.W. Plastics.

Apps discloses the bottle case as discussed above. Apps discloses the bottle case except for the limitation that each of the columns includes at least one vertical, longitudinal recess opening upwardly and aligned with one another. Wallace teaches a case for fruit with pylons around the sides and two columns projecting upwardly from the top surface of the bottom. Grooves 20 in the columns represent a vertical longitudinal recess opening upwardly and aligned with one another. It would have been obvious to add the recesses 20 to the columns of Apps as motivated by the drainage these recesses provide to prevent water or leaked fluid from pooling and to prevent debris from collecting which would make the bottle case unsanitary and unsightly.

Kelley, Kappel and D.W. Plastics are applied as discussed above.

Claims 24, 25, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps ('874) (Apps), [Apps ('874) in view of Kelley, Kappel and D.W. Plastics] and [Apps ('874) in view of Wallace, Kelley, Kappel and D.W. Plastics] in view of Sauey.

This rejection has been made in the event that wall 29 should not be deemed to be part of the column.

Apps discloses the invention except for the vertically extending portion. Sauey teaches columns 34, 32, 31 formed by the finger depressions 31 wherein the columns have vertically extending portions disposed below the lower edge of the side structural members and substantially coplanar with the lower surface of the floor structure. It would have been obvious

to modify the columns of Apps to include the vertically extending portions to seal the upper chamber or pocket of the case to prevent the contents from slipping through an opening.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 12-16 and 18-55 are provisionally rejected under the judicially created doctrine of double patenting over claims 1-16 of copending Application No. 09/626,517. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: A stackable low depth case comprising side walls, end walls, bottom, pylons and columns.

Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double patenting over claims 1-30 of U. S. Patent No. 5,660,279 to Apps et al.; over claims 1-16 of U. S. Patent No. 5,651,461 to Apps et al.; over claims 1-9 of U. S. Patent No. 5,529,176 to Apps et al.; and Fig. 1-6 of U. S. Design Patent No. 378,249 to Apps et al. since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows: A stackable low depth case comprising side walls, end walls, bottom, pylons and columns.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

Applicant's arguments filed December 22, 2003 have been fully considered but they are not persuasive.

Regarding the anticipation rejection of claim 29, the second height is different from the first height.

Regarding the obviousness rejection of Apps in view of Kelley, Kappel and D.W. Plastics, applicant understands that the examiner is not rejecting these claims based upon more than one reference. It is not understood why applicant has concluded this. The rejection is based upon no less than four references, (1) Apps, (2) Kelley, (3) Kappel and (4) D.W. Plastics. Regarding the argument that Sauey is non-analogous art, Sauey is deemed applicable insofar as

it is pertinent to the problem solved of having a full height column and is pertinent to the field of endeavor of a case for holding identical items in a spaced apart manner.

The double patenting rejections are not obviousness-type double patenting rejections wherein a reference must be provided to show the missing elements and motivation discussed.

It seems bizarre that applicant refers to “page 8 of Board Decision” as the present case has never been appealed or had an interference attempted. If said Board Decision refers to some other case, it would have been normal to at least provide an appeal or interference number or a case serial number. At this point the referred to Board Decision seems irrelevant to this case.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen J. Castellano whose telephone number is 703-308-1035. The examiner can normally be reached on M-Th 6:30-5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W. Young can be reached on 703-308-2572. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1148.

*S. Castellano*  
Stephen J. Castellano  
Primary Examiner  
Art Unit 3727

sjc  
September 3, 2003